MD ARIS ZAINAL ABIDIN

v.

SURUHANJAYA PASUKAN POLIS & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOHD SAARI YUSOF JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: P-01-136-95]
14 MAY 2002

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for - Limitation - Rules of the High Court 1980, O. 53 r. 1A - Whether application made out of time - Whether procedure for application occasioned injustice*

STATUTORY INTERPRETATION: *Constitution - Principles of interpretation - Rule of harmonious construction - Whether O. 53 r. 1A of Rules of the High Court 1980 to be read harmoniously with art. 5(1) of Federal Constitution*

The appellant was dismissed from service on 28 December 1992 and was accordingly informed on 6 January 1993. On 11 February 1993, he filed an application for leave to issue *certiorari* to quash the decision dismissing him, which was granted. Counsel for the respondents raised a preliminary objection, arguing that this court did not have the jurisdiction to hear the motion as the appellant's application was filed beyond the six weeks' period prescribed by O. 53 r. 1A of the Rules of the High Court 1980.

Bound by the decision in *Mersing Omnibus*, the trial judge acceded to the preliminary objection and dismissed the substantive motion in *limine*. Hence, the appellant appealed on the premise that the procedural requirement under r. 1A was unfair.

The issue before this court was whether it was fair to require the applicant for *certiorari* to move the court for leave within six weeks from the date of the decision of his dismissal. It is to be noted that r. 1A is no longer applicable as the whole of O. 53 was replaced *vide* PU(A) 342/2000 which came into force on 22 September 2000.

Held:
Per Gopal Sri Ram JCA

[1] It would be quite possible for an administrator to make a decision, keep it to himself for more than six weeks and then release it to the unfortunate citizen who would be adversely affected by the decision. Following the actual wording of r. 1A would mean that the litigant *ie*, private citizen,

would be out of court even before he arrived there. Accordingly, it would be contrary to the rules of natural justice to require an applicant to make his application for leave for *certiorari* within six weeks from the date of a decision. (p 15 d, e & f)

[2] Procedural sections are no longer to be regarded as mandatory. Rather, the true question that arises for consideration is whether on the facts of a given case the particular non-observance has occasioned injustice or prejudice. (p 17 b)

[3] Applying the rule of harmonious construction, r. 1A should be read harmoniously with art. 5(1) of the Federal Constitution. Thus, the words "… after the date of the proceedings" must fall to be interpreted so that time runs from the date the decision was communicated to the appellant, *ie*, on 6 January 1993, and not the date whence his dismissal was decided. (p 17 d)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah diberhentikan daripada perkhidmatan pada 28 Disember 1992 dan telah diberitahu berhubung dengannya pada 6 Januari 1993. Pada 11 Februari 1993, beliau telah memfailkan satu permohonan untuk kebenaran bagi mengeluarkan *certiorari* bagi membatalkan keputusan yang memberhentikan beliau, yang mana telah diberikan. Peguam bagi pihak responden-responden telah membangkitkan bantahan awal, dengan berhujah bahawa mahkamah ini tidak mempunyai bidangkuasa untuk mendengar usul tersebut kerana permohonan perayu telah difailkan di luar tempoh enam minggu yang ditetapkan oleh A. 53 k. 1A Kaedah-kaedah Mahkamah Tinggi 1980.

Terikat oleh keputusan di dalam *Mersing Omnibus*, hakim perbicaraan bersetuju dengan bantahan awal tersebut dan menolak usul substantif *in limine*. Oleh yang demikian, perayu telah merayu atas alasan bahawa syarat prosedural di bawah k. 1A adalah tidak adil.

Isu di hadapan mahkamah ini adalah sama ada ianya adil untuk mempersyaratkan pemohon bagi mendapatkan *certiorari* bagi mengusul mahkamah untuk kebenaran dalam tempoh enam minggu daripada tarikh keputusan pemecatan. Adalah harus diperhatikan bahawa k. 1A tidak lagi boleh dipakai kerana keseluruhan A. 53 telah digantikan melalui PU(A) 342/2000 yang mana berkuatkuasa pada 22 September 2000.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ianya adalah agak berkemungkinan untuk pentadbir membuat satu keputusan, mendiamkan diri selama lebih daripada enam minggu dan kemudiannya memaklumkan mengenainya kepada warga malang itu yang akan terjejas secara bertentangan oleh keputusan tersebut. Menuruti perkataan sebenar k. 1A akan bermakna bahawa litigan, yakni orang awam tersebut, akan terusir dari mahkamah sebelum sempat menghadirinya. Sehubungan itu, ianya adalah bertentangan dengan kaedah-kaedah keadilan asasi untuk mempersyaratkan seseorang pemohon supaya membuat permohonannya untuk kebenaran bagi mendapatkan *certiorari* dalam tempoh enam minggu daripada tarikh sesuatu keputusan.

[2] Seksyen-seksyen prosedur tidak lagi boleh dianggapkan sebagai mandatori. Sebaliknya, persoalan sebenar yang berbangkit untuk pertimbangan adalah sama ada berdasarkan fakta-fakta sesuatu kes tertentu ketidakpatuhan yang khususnya itu telah menyebabkan ketidakadilan atau kemudaratan.

[3] Memakai kaedah pembentukan kesesuaian, k. 1A seharusnya dibaca secara bersesuaian dengan art. 5(1) Perlembagaan Persekutuan. Oleh itu, perkataan "… after the date of the proceedings" semestinya ditafsirkan sedemikian bahawa masa mula beredar daripada tarikh keputusan disampaikan kepada perayu, iaitu pada 6 Januari 1993, dan bukannya tarikh apabila pemecatan beliau diputuskan.

[Rayuan dibenarkan.]

Case(s) referred to:

Bank of America National Trust and Savings Associations v. Chai Yen [1980] 1 MLJ 198 ***(refd)***

Dunlea v. A-G [2000] 3 NZLR 136 ***(refd)***

Maharaj v. AG of Trinidad and Tobago (No 2) [1979] AC 385 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 ***(not foll)***

Nilabati Bahera v. State of Orissa AIR [1993] SC 1960 ***(refd)***

R v. Immigration Appeal Tribunal, ex p Jeyeanthan [1999] 3 All ER 231 ***(refd)***

Secretary of State for Defence v. Warn [1970] AC 394 ***(refd)***

Simpson v. A-G [1994] 3 NZLR 667 ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 16
Federal Constitution, arts. 4(1), 5(1)
Rules of the High Court 1980, O. 53 r. 1A

For the appellant - Hj Mohd Ismail Mohamed; M/s Ismail, Khoo & Assoc
For the respondents - Asmabi Mohamad SFC

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-3-1993]

Reported by M Maheswaran

JUDGMENT

(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This appeal concerns the interpretation of a rule that is no longer with us. It is r. 1A of O. 53 of the High Courts Rules 1980 as it stood before the whole of that order was replaced *vide* P.U A 342/2000 which came into force on 22 September 2000.

The factual matrix which forms the background of this appeal may be shortly stated.

The appellant was a police inspector. On 28 December 1992 he was dismissed from service. The decision dismissing him was communicated to him on 16 January 1993 but it was not until 11 February 1993 that he filed his application for leave to issue *certiorari* to quash the decision dismissing him. Leave was granted on 29 March 1993. However at the hearing of the substantive motion the learned federal counsel at the outset took a preliminary objection as to the jurisdiction of the court to hear the matter. The argument was that the application having been filed more than six weeks after 28 December 1992 the court had no jurisdiction to entertain the motion; that being clear from the plain words of r. 1A of the Rules of the High Court 1980.

The authority cited before the learned judge and by which he was clearly bound is *Mersing Omnibus Co. Sdn Bhd v. Minister of Labour and Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266. The learned judge acceded to the preliminary objection; as he was obliged to. The substantive motion was dismissed in *limine*. The appellant now appeals to us.

The point now taken before us is that r. 1A insofar as it requires the application for leave to be made within six weeks from the date of the decision provides for an unfair procedure. In our view there is merit in this argument.

All laws enacted in the Federation of Malaysia whether by Parliament or by any inferior law making authority such as the Rules Committee acting under s. 16 of the Courts of Judicature Act 1964 must accord with the Federal Constitution, the supreme law by its own declaration: see art. 4(1).

It is therefore axiomatic that no lawmaker within our shores has authority to make law which contravenes the Federal Constitution. It matters not a jot whether the law is substantive or procedural: constitutional compliance is mandatory.

Courts like any other arm of the government are similarly bound by the Constitution. But there is a difference. A decision of a court cannot be challenged on the ground that it is unconstitutional simply because it contains an error of fact or an error of law. That is because there is a self-correction process available within the justice system by means of an appeal at one or more levels. However a procedural rule of court does not enjoy the same protection.

These propositions are amply clear from the following passage in the judgment of Lord Diplock in *Maharaj v. A.G. of Trinidad and Tobago (No. 2)* [1979] AC 385:

> In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to the higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors as in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event.

The other authority we would refer to is *Bank of America National Trust and Savings Associations v. Chai Yen* [1980] 1 MLJ 198. Lord Lane delivering the judgment of the Privy Council had this to say:

> The essence of any rule of procedure must be fairness, and to apply stringently the provisions of rule 13(a) would in the circumstances such as the present work manifest injustice to the respondent.

We are conscious that the remarks made by Lord Diplock were in reference to the Constitution of Trinidad and Tobago a sister nation within the Commonwealth. However the provisions of the Constitution that the Privy Council was dealing with in that case are principally those provisions entrenching fundamental human rights that are entrenched within Part II of our Federal Constitution.

Further, it may be relevant to observe that *Maharaj*'s case has been applied in other jurisdiction; having Constitutions similar to our own. See, *Nilabati Bahera v. State of Orissa* AIR [1993] SC 1960; *Simpson v. Attorney General* [1994] 3 NZLR 667. See also, *Dunlea v. Attorney General* [2000] 3 NZLR 136.

That brings us to the present appeal. The pertinent question that arises is whether it is a fair procedure to require an applicant for *certiorari* to move the court for leave within six weeks from the date of the decision.

If it is then it is the end of the matter. But we do not think that it is. As observed by our learned brother Abdul Kadir Sulaiman JCA during yesterday's proceedings, it will be quite possible for an administrator to make a decision, keep it to himself for more than six weeks and then release it to the unfortunate citizen who is adversely affected by the decision. If we follow the actual wording of r. 1A it would mean that the litigant ie, private citizen would be out of court even before he arrived there. Examples may be multiplied, with no assistance. But we are unable to say that there is really an answer to the illustration provided by our learned brother.

In our judgment it is contrary to the rules of natural justice to require an applicant to make his application for leave for certiorari within six weeks from the date of a decision.

Take this very case. The decision was made on 28 December 1992 and was communicated to the appellant on 16 January 1993. Learned senior federal counsel's argument is that he had three weeks nevertheless to make the application. With respect, the point that the argument misses is that the appellant would have had nine weeks and not three weeks if the rule were held to be contrary to natural justice.

What remains is the decision of *Mersing Omnibus Co. Sdn Bhd v. Minister of Labour and Manpower & Anor (supra)*. The judge is not to be faulted for applying it. We have already said the judge was obliged to do so. But what is plainly obvious from the reading of the judgment in that case is that the argument raised before us was neither raised nor considered there. We cannot predict what the decision would have been had the point of constitutionality been pursued. But this is not the only point about that case. There is another. And it is this.

In the course of its judgment the former Federal Court referred to the following passage in the speech of Lord Hodson in *Secretary of State for Defence v. Warn* [1970] AC 394, 402:

> Procedural sections are usually mandatory and there is nothing which points to the contrary in this case.

However we would observe that there has been a substantial departure from that view in recent times in England. This is reflected in the seminal judgment of Lord Woolf MR (now the Lord Chief Justice of England and Wales) in *R v. Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231. The first passage is at p. 235 where the learned Master of the Rolls sets out the previous position as follows:

> The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as 'shall' or 'must' is used.

The second passage is at p. 238. It is of critical importance and reflects what we consider should be the approach we should take. It reads:

> [I] suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.) Which

> questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

The nett effect of the foregoing passage is that procedural sections are no longer to be regarded as mandatory. Rather, the true question that arises for consideration is whether on the facts of a given case the particular non-observance has occasioned injustice or prejudice.

In view of what we have expressed thus far, we find ourselves unpersuaded by the argument that *Mersing Omnibus Co. Sdn Bhd v. Minister of Labour and Manpower & Anor* continues to hold the force of binding precedent. While therefore not faulting the learned judge for applying it we are disinclined to do so ourselves.

In our considered judgment r. 1A should be read harmoniously with art. 5(1) of the Federal Constitution. When this is done the words "… after the date of the proceedings" must fall to be interpreted so that time runs from the date the decision was communicated to the appellant.

This is not the first time that our courts are applying the rule of harmonious construction. We have done it elsewhere. See *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481.

For the reasons already given we are of the view that the preliminary objection ought to have failed before the High Court. We would therefore allow this appeal and set aside the order of the learned judge. We would restore the substantive motion paper to file and remit it to the High Court for hearing on the merits. There will be no order as to costs. We also make an order for the deposit to be refunded to the appellant.